UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

WILMA FONTAN, Plaintiff, v. JOHN POTTER, POSTMASTER GENERAL, Defendant.	Civil No. 04-1317 (JAF)

OPINION AND ORDER

Plaintiff, Wilma Fontán, filed the present action against Defendant, John E. Potter, Jr., in his official capacity as Postmaster General of the United States of America, alleging discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e to 2000e-17 (1994 & Supp. 2005), the Rehabilitation Act, 29 U.S.C. § 701 et seq. (1999 & Supp. 2005), and Title I of the Civil Rights Act of 1991 ("Title I"), 42 U.S.C. § 1981a (2003 & Supp. 2005). Docket Document No. 1. Defendant[1] moves for summary judgment, claiming that: (1) Plaintiff cannot put forward a prima facie Rehabilitation Act claim because she is not disabled, was not qualified to perform her position without a reasonable accommodation, and did not suffer discrimination; (2) Plaintiff did not experience a hostile work environment or

[1]For clarity purposes, "Defendant" will refer to the U.S. Postal Service, as John E. Potter, Jr., the named defendant to this action, is sued in his official capacity and is not personally implicated in any way.

harassment because of a disability; (3) Plaintiff's constructive discharge claim is unsustainable because she failed to exhaust her administrative remedies, and in any case cannot establish that she was constructively discharged; and (4) Defendant did not retaliate against Plaintiff for her participation in protected activity. Docket Document No. 24.

I.

Factual and Procedural Synopsis

Unless otherwise indicated, we derive the following factual summary from the parties' respective statements of fact, which only rarely diverge. Docket Documents No. 25, 39.

Plaintiff was a United States Postal Service ("Postal Service") employee from August 4, 1984, until August 25, 2000. From on or around early 1999, Plaintiff worked as Supervisor of Customer Services in the Bayamón Gardens Station, located in Bayamón, Puerto Rico. In her capacity as Supervisor, Plaintiff performed duties relating to finance, preparation of reports, employee supervision, and managerial tasks from 9:00 A.M. until 6:00 P.M. Plaintiff's supervisor from 1999 was Luther Alston, Station Manager Customer Services.

On April 25, 2000, Alston conferred with Plaintiff regarding an incident involving the actions of a subordinate employee, Doris Vázquez. Apparently, Alston had witnessed Vázquez violating her responsibilities by discarding, rather than processing, official

mail. Alston had salvaged it in its crumpled state and directed Plaintiff to maintain possession of the discarded mail. The parties differ on the following issue: Defendant claims that Alston asked Plaintiff not to raise the issue with Vázquez until Alston had had the opportunity to conduct an investigation; Plaintiff claims that she was directed to confront Vázquez and gauge her reaction.

On April 26, 2000, Plaintiff confronted Vázquez regarding her discarding of official mail. The following day, Vázquez verbally assaulted and threatened Miriam Nieves, another employee under Plaintiff's supervision, apparently because she was upset about the negative attention that she had received for having wrongfully discarded mail. Alston intervened and ended the altercation, and then immediately met with Plaintiff to express his displeasure that Plaintiff had violated his directive not to confront Vázquez until further notice. Alston became upset at Plaintiff for mishandling the situation and not understanding his directions, and for causing the dispute between Vázquez and Nieves.

As a result of this ugly workplace meltdown, Alston called the Postal Police, Plaintiff requested assistance from the agency's Employee Assistance Program offices, Nieves was ordered to return to her station, and Vázquez was placed on emergency off-duty status and told to leave the Bayamón Gardens Station.

Plaintiff claims that her baseline condition of anxiety was considerably exacerbated by the April 27 altercation such that the

next morning, April 28, she did not go to work right away and went instead to her treating psychiatrist, Dr. Jorge Sánchez, on an emergency basis. Dr. Sánchez issued a medical certificate authorizing her leave from work for the next five days.

Plaintiff had not warned Alston of her unscheduled trip to Dr. Sánchez. Alston transmitted a beeper message to Plaintiff ordering her to come to work, but by the time she received the message, she was already tardy. Plaintiff eventually arrived at her dysfunctional workplace. Alston ignored Dr. Sánchez' sick leave certificate for Plaintiff, and directed Plaintiff to work her shift.

The same day, April 28, 2000, Alston instructed Plaintiff to prepare a warning letter to Vázquez and other related documents concerning the April 27 altercation, and gave her a rough draft of what he wanted to be stated in the letter. Plaintiff disagreed with Alston's version of events and his decision to discipline only Vázquez, but not Nieves. Plaintiff did not complete the documents as directed, but instead went on disability leave and took the unfinished documents home.

On or around May 1, 2000, while Plaintiff was still on disability leave, Alston called Plaintiff on the telephone, questioned her for her absence from work, and directed her to bring the documents in completed form to work within two hours.

Plaintiff consulted the Postal Service's Employee Assistance Program and the Labor Relations Department regarding her dispute with

Alston. Following their recommendations, she issued a letter of warning to Vázquez and another letter to Nieves and mailed the letters to their respective addresses.[2]

On May 4, 2000, Alston issued a proposed letter of warning to Plaintiff for what he perceived to be her failure to follow instructions and to discharge her supervisory duties.

On May 10, 2000, Plaintiff underwent surgery related to a bladder disorder at the Ashford Medical Center in Condado. Alston's letter of warning was received at her home on the same day. Plaintiff was discharged from the hospital on May 13, 2000, but remained under the care of her surgeon, Dr. Roberto Canto.

On May 15, 2000, Plaintiff initiated contact with an Equal Employment Office ("EEO") counselor in order to proceed with charges against Alston.

Plaintiff underwent a surgery follow-up on May 19, 2000, after which Dr. Canto completed a medical certificate authorizing Plaintiff to remain on medical leave until June 6, 2000.

While on medical leave, Plaintiff received two telephone calls from her workplace. The first call was made by Ms. Nieves, at Alston's bidding, in order to confirm that Plaintiff had received (or else was at her house so that she could receive) the May 10 warning

[2]Due to a lack of clarity in both statements of fact, we are unclear whether the letter commissioned to Nieves was a warning letter and, if so, whether this was in accordance with Alston's instructions. Docket Document Nos. 25, 39. We do not perceive this ambiguity as being crucial to this case, and so will proceed with a spotless conscience.

letter. Alston made the second telephone call himself, advising Plaintiff that she had not submitted all of the required documentation to support her medical leave.

Plaintiff concedes that she may not have properly completed her application for medical leave, but meanwhile asserts that she became fearful of Alston because of the two telephone calls and, therefore, changed her telephone number to avoid further unwanted contact from Alston or Postal Service employees under his control.

Plaintiff had requested and received approval for medical leave for a term expiring on May 19, 2000. On or around May 23, 2000, Plaintiff, still absent from work, sent a facsimile transmission to Alston for a request for medical leave from May 13 to May 26 and from May 27 to June 9.

On May 26, 2000, Alston sent to Plaintiff a notification warning her that she was absent from duty without approved leave because her approved leave from duty had expired on May 19, 2000, and directing her to furnish evidence justifying her absence. The letter warned that "[f]ailure to comply with the above instructions will result in your being charge [sic] AWOL [note: Absent Without Official Leave] and may by followed with disciplinary action up to including removal from the Postal Service." Docket Document No. 27, Exh. 5. Also on May 26, 2000, Alston denied Plaintiff's belatedly submitted May 23 request for authorization of continued medical leave, purportedly because it was submitted belatedly and was not completed correctly.

Plaintiff asserts that Alston fully knew, at the time he denied her request, that she was recovering from surgery and would not be able to return to work until June 6, 2000. Plaintiff also admits that some of her application forms for medical leave were not completed correctly, due to her medical incapacity, but maintains that because Alston knew the reasons for her absence, he was obligated to grant her requests and clear up any ambiguities at a later time.

Plaintiff asserts that Alston's actions exacerbated her anxiety symptoms during her convalescence, and compelled her to be hospitalized at the First Pan-American Hospital, a psychiatric institution, from June 1 to June 5, 2000 with a diagnosis of severe depression. The depression diagnosis was drawn from the following symptoms: Plaintiff isolated herself, would not eat, would not sleep even with medication, lost her ability to concentrate and do small tasks at home, maintained low self-esteem, suffered disabling migraine headaches, lost her memory, developed an intolerance for music, radio or television, and lacked the desire to care for herself. From June 6 to June 21, 2000, Plaintiff received ambulatory psychiatric treatment from First Pan-American Hospital. After Plaintiff's release from psychiatric care, Plaintiff's psychiatric physician, Dr. Sánchez, determined that she was still unable to return to work, and so granted her certification for medical leave for several more weeks. On July 7, 2000, Dr. Sánchez issued a

medical certificate indicating Plaintiff's mental readiness to return to work "with reasonable accommodation." Docket Document No. 27, Exh. 8. Although the medical certificate did not specify an accommodation, Plaintiff avers that Dr. Sánchez indicated to her, when writing the certification, that the suggested accommodation consisted of transferring her to another postal station, away from Alston.

On or around July 13, 2000, Plaintiff presented a work restriction evaluation form requesting accommodations due to the following limitations: she could not lift more than ten pounds, bend, squat, kneel, twist, climb, push, or pull; she could remain for no more than eight hours in a sitting position, and could stand for no more than six hours or walk no more than two hours.

On July 20, 2000, Plaintiff reported back to the Station but found herself unable to go inside. In a panic, she went instead to see Dr. Sánchez.

Based on Plaintiff's continuing situation, Dr. Sánchez now recommended that she be taken away from Alston's supervision and relocated to a low stress, less demanding environment. On August 1, 2000, Plaintiff met with Robert Vázquez ("Mr. Vázquez"), Manager of Customer Service Operations, to discuss accommodation options. Mr. Vázquez offered Plaintiff the possibility of relocating to any one of four postal stations in the greater San Juan area: Hato Rey, Santurce, Fernández Juncos, and Cupey. Plaintiff requested transfer

to any available positions in the towns of Humacao, Cayey or Vega Baja, but Mr. Vázquez was unable to offer positions in those particular locales. Plaintiff elected to transfer to Cupey Station for a temporary assignment, and was instructed to report to work in early August.

Plaintiff's engagement at Cupey Station was short-lived. She admits to having regularly arrived for work at Cupey Station ten or fifteen minutes late. She attributes her tardiness to "sleeping problems," and maintains that she was never absent. In an affidavit, Mr. Vázquez noted that regardless of his efforts to accommodate Plaintiff's needs, she was "unable to sustain regularity in attendance nor reporting timely to work." Docket Document No. 27, Exh. 12.

Plaintiff was ordered to resume working at the Bayamón Gardens Station under Alston's supervision, effective August 17, 2000. Plaintiff alleges that Alston retaliated against her for requesting accommodation by altering her schedule such that one of her days off was moved from Saturday to Wednesday. Shortly after returning to work, Plaintiff was detailed to the Bayamón Pueblo Branch, purportedly because the Bayamón Pueblo Branch was "behind with their route management and needed support." Docket Document No. 25. When she arrived at the Bayamón Pueblo Branch, Plaintiff was assigned to perform a "park and loop" route, requiring her to mount and dismount

a postal vehicle and walk routes during each stop. The total amount of walking exceeded Plaintiff's stated limit of two hours.

Plaintiff concedes that after the Bayamón Pueblo Branch manager told her about the route, she did not call Alston to notify him about the walking-intensive nature of the detail, but instead proceeded to work. She did, however, send Alston a note the day before going to Bayamón Pueblo Branch (and before learning about the route), and she also sent a letter after completing the Bayamón Pueblo Branch detail, notifying Alston that the detail had required her to walk in excess of her proscribed limits. The following day, Mr. Vázquez personally came to the Bayamón Pueblo Branch and concluded her detail there.

On or about August 25, 2000, Plaintiff returned to the Bayamón Gardens Station. At some point during the day, Alston, visibly upset, called her into his office to meet with her. Alston told Plaintiff that he wanted her to start clocking in and out of work so that he could monitor her hours. Plaintiff was intimidated by Alston's approach: she claims that he spoke in an angry whisper and with a glowering stare. Upset, Plaintiff called her son to have him pick her up from work. Before leaving, she told Alston that she was not feeling well and requested his signature in a leave request. He refused, and allegedly told her that she knew what would happen if she left.

Regardless of Alston's threat, Plaintiff left work and went directly to seek counseling with Dr. Sánchez. Dr. Sánchez found that

Plaintiff was suffering another emotional crisis and was unable to work. He signed a medical certificate authorizing medical leave and recommending her hospitalization.

On August 30, 2000, Plaintiff was scheduled to report to the Postal Service Medical Unit for a fitness-for-duty meeting, in order to find a solution to Plaintiff's accommodation request through mediation. Plaintiff's husband arrived at the Medical Unit to inform the Postal Service that Plaintiff was unable to attend the meeting. He hand-delivered a medical note from Dr. Sánchez excusing her presence at the fitness-for-duty meeting.

Plaintiff received ambulatory psychiatric treatment at the First Pan-American Hospital from September 11 to 25, 2000. Plaintiff requested from Alston annual leave in lieu of sick leave for the purpose of continuing her medical treatment. Alston denied Plaintiff's request and charged her with being AWOL. Plaintiff never returned to work after August 25, 2000.

On September 25, 2000, the Postal Service received from Plaintiff an "Information for Pre-Complaint Counseling" form, dated September 12, 2000. Plaintiff also presented to the Postal Service a medical note from Dr. Sánchez stating: "As was mentioned in the psychiatric report of July 9, 2000, she should return to work in a low stress, low demanding environment. If she is placed under stressful situation a marked deterioration is expected." Docket Document No. 25, Exh. 9.

On October 5, 2000, a meeting took place between Mr. Vázquez, Plaintiff, and Dr. Luis Echavarría Beza, Medical Officer for the Postal Service in the Caribbean District. Dr. Echavarría indicated that he would need to confer with Dr. Sánchez, and so Dr. Sánchez also participated via telephone conference. Defendant avers that at the meeting, Mr. Vázquez articulated the Postal Service's position that reasonable accommodations were only made so that an employee could comply with the essential elements of her position, that the ability to handle stress was an integral part of Plaintiff's position, and that, therefore, Plaintiff could not comply with the supervisory functions or responsibilities required by her job.

Plaintiff avers that she never requested to be placed in a non-supervisory position, but instead merely insisted that she be relocated so that she would not have to work under Alston's supervision. As a result of the meeting, Dr. Sánchez issued another medical certificate, recommending Plaintiff's relocation and also a maximum eight-hour schedule that could accommodate her continued pharmacological and psychotherapeutic treatment.

On October 6, 2000, Plaintiff sent a letter to Mr. Vázquez, acknowledging the meeting that took place the day before and requesting reasonable accommodation through a relocation and a work assignment between 9:30 A.M. and Midnight.

Another telephone conference between Dr. Sánchez and Dr. Echavarría occurred, followed by another meeting with

Dr. Echavarría, Plaintiff, and Mr. Vázquez. Mr. Vázquez informed Plaintiff that he could not find a match for her reasonable accommodation request because he could not find a position with hours that commenced as late as 9:30 A.M. Mr. Vázquez recommended that Plaintiff's case be referred to a reasonable accommodation committee. Plaintiff claims that Mr. Vázquez stated that given her mental condition and dependence on medication, allowing her to work in a supervisory position would pose a threat to other employees. Plaintiff also asserts that Mr. Vázquez' reasons were pretextual, as there were supervisory positions available at nearby postal stations that conformed to her requirements.

On November 13, 2000, Mr. Vázquez referred Plaintiff's case to the Reasonable Accommodation Committee ("RAC"). The RAC met on November 21, 2000, to discuss Plaintiff's case and recommended that Mr. Vázquez and Plaintiff meet with the president of the National Association of Postal Supervisors ("NAPS"), Carmen Pérez, to help find a suitable position for Plaintiff. Purportedly because of Plaintiff's absence from work, Mr. Vázquez never scheduled a meeting for Plaintiff to meet with Ms. Pérez.

On December 19, 2000, the EEO office received a formal complaint from Plaintiff, dated December 1, 2000, claiming that the Postal Service had: (1) failed to reasonably accommodate her; (2) denied her requests for annual leave in lieu of sick leave and instead charged her AWOL; and (3) from October 6, 2000, failed to assign her work

consistent with her disability limitations. Plaintiff also now asserts that her claims are based on the following acts by Alston: (1) assigning her work outside of her medical restrictions; (2) refusing to grant sick leave and leave to visit Dr. Sánchez; and (3) arbitrarily changing her days off from work.

Plaintiff claims that "as a result of the Agency's failure to reasonably accommodate . . . her mental condition worsened and she was forced into retirement due to her disabilities." She applied for and received disability retirement in or around October 2002.

On April 14, 2004, Plaintiff filed the present action. Docket Document No. 1. She amended the complaint on April 15, 2005. Docket Document No. 12.

Defendant moved for summary judgment on December 13, 2005. Docket Document No. 24. Plaintiff filed an opposition on February 16, 2006. Docket Document No. 38.

II.

Motion for Summary Judgment Standard under Rule 56(c)

The standard for summary judgment is straightforward and well-established. A district court should grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). A factual dispute is "genuine" if it could be resolved

in favor of either party, and "material" if it potentially affects the outcome of the case. Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6, 19 (1st Cir. 2004).

The moving party carries the burden of establishing that there is no genuine issue as to any material fact, though the burden "may be discharged by 'showing'–that is, pointing out to the district court–that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). The burden has two components: (1) an initial burden of production that shifts to the nonmoving party if satisfied by the moving party; and (2) an ultimate burden of persuasion that always remains on the moving party. Id. at 331.

The non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). Summary judgment exists "to pierce the boilerplate of the pleadings and assess the proof in order to determine the need for trial." Euromodas, Inc. v. Zanella, 368 F.3d 11, 17 (1st Cir. 2004) (citing Wynne v. Tufts Univ. Sch. of Med., 976 F.2d 791, 794 (1st Cir. 1992)).

III.

Analysis

Defendant argues that summary judgment should be awarded in its favor because: (1) Plaintiff has failed to set forth a prima facie

case of disability discrimination; (2) hostile work environment; (3) constructive discharge; or (4) retaliation; and (5) Plaintiff failed to exhaust administrative remedies with regards to her constructive discharge claim.

A. Disability Discrimination

To assert a claim for failure to accommodate under the Rehabilitation Act, Plaintiff must establish: (1) that she suffered from a "disability" under the meaning of the statute; (2) that she was a qualified individual in that she was able to perform the essential functions of her job, either with or without a reasonable accommodation; and (3) that, despite, the Postal Service's knowledge of her disability, it did not offer a reasonable accommodation for the disability. Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6, 20 (1st Cir. 2004). As Defendant asserts that Plaintiff cannot establish any of the three requirements under the statute, we will address each element in turn.

1. Disability

The Americans with Disabilities Act ("ADA"), which is highly analogous to the Rehabilitation Act except that it applies to non-federal workers, defines a "disability" as either (a) physical or mental impairment which substantially limits one or more of an individual's major life activities; (b) a record of such impairment; or (c) being regarded as having such an impairment. 42 U.S.C. § 12102(2)(2003 & Supp. 2005); see also Quiles-Quiles v. Henderson,

439 F.3d 1, 5 (1st Cir. 2006)("[T]he liability standards are the same" under the Rehabilitation Act and the ADA.); Calero-Cerezo, 355 F.3d at 19 ("Although . . . the ADA does not apply [in cases involving federal employees], the case law construing the ADA generally pertains equally to claims under the Rehabilitation Act").

Plaintiff bears the burden of establishing whether: (1) her condition constitutes a "mental impairment"; (2) the life activities upon which she relies constitute "major life activities;" and (3) the impairment substantially limits the identified major life activity. Bailey v. Georgia-Pacific Corp., 306 F.3d 1162, 1167 (1st Cir. 2002)(citing Bragdon v. Abbot, 524 U.S. 624, 631 (1998); Toyota Motor Mfg., Ky. Inc. v. Williams, 534 U.S. 184, 196 (2002); Lebrón-Torres v. Whitehall Labs., 251 F.3d 236, 239-40 (1st Cir. 2001)).

Defendant does not seriously argue against the assertion that Plaintiff suffers from a mental impairment. Indeed, depression is consistently recognized as a disability-qualifying mental impairment. See Calero-Cerezo, 355 F.3d at 20; Craido v. IBM Corp., 145 F.3d 437, 442 (1st Cir. 1998). Plaintiff's repeated hospitalization, her heavy reliance on Dr. Sánchez's pharmacological and psychiatric treatment, her many sick-leave absences, and her inability to sleep or eat healthfully are all directly probative of a condition of depression sufficiently severe to qualify as a mental impairment. Calero-Cerezo, 355 F.3d at 21.

Plaintiff avers that she was unable to sleep, eat, socialize, work, concentrate, or care for herself, and that she suffered from migraine headaches. These activities– particularly eating and sleeping– have been consistently recognized as "major" for ADA and Rehabilitation Act purposes. Guzman-Rosario v. United Parcel Serv., 397 F.3d 6, 11 (1st Cir. 2005); Calero-Cerezo, 355 F.3d at 21; Criado, 145 F.3d at 442-43; Whitney v. Greenberg, Rosenblatt, Kull & Bitsoli, P.C., 258 F.3d 30, 33 n. 4 (1st Cir. 2001). Further, Plaintiff succeeds in demonstrating that her depression "substantially" limited her ability to sleep and eat normally. See Sutton v. United Air Lines, Inc., 527 U.S. 471, 480 (1999). Plaintiff need not show, after all, that she literally did not eat or sleep during her depressive episodes– only that these activities were negatively impacted. Defendants do not contest that Plaintiff suffered from an inability to sleep and eat normally, and an impairment can be considered to substantially limit a major life activity even if the sufferer is still able to engage in the activity to a limited extent. See Gillen v. Fallon Ambulance Serv., Inc., 283 F.3d 11, 22 (1st Cir. 2002).

The record clearly supports a finding that Plaintiff is disabled within the Rehabilitation Act's cognizance.

2. Qualified Individual

To be a "qualified individual" under the Rehabilitation Act, Plaintiff must show that she possessed "the requisite skill,

experience, education, and other job-related requirements for the position and, second, that she is able to perform the essential functions of the position with or without a reasonable accommodation." Calero-Cerezo, 355 F.3d at 22. Defendant argues that Plaintiff was unqualified. Docket Document No. 24.

In the present case, Plaintiff worked at the Bayamón Gardens Station in a supervisory capacity. As Supervisor, Customer Services, she was responsible for overseeing carriers' departure and return, ensuring that carrier trips are properly logged, stamp distribution among window clerk employees, issuing financial reports, determining why mail was returned to the station, solving timing and labor issues to assure timely delivery of express mail, and giving support to other post offices when they needed help on specific routes. Plaintiff typically had eight or nine employees under her direct supervision.

In addition to this relatively sterile list of responsibilities, the uncontested facts allow us a vivid window into the demands imposed by Plaintiff's supervisory position. She was called upon to play some role in the disciplining of Ms. Vázquez, a subordinate employee, which we interpret as meaning that she was charged with all of the pressures and demands involving personnel management typically required by a supervisory position. Additionally, we note that Plaintiff's position required oversight of time-sensitive work

projects, such as prompt delivery of express mail, that inevitably create a high-pressure working environment.

Defendant contends that Plaintiff's anxiety was not specific to her relations with Alston, but was rather a symptom of her inability to handle the pressures of a supervisory role. Defendant points out that Plaintiff had experienced problems before that also stemmed from supervisory pressures: in 1997, when Plaintiff first assumed a supervisory role (in a temporary, rather than appointed, capacity), she suffered severe anxiety relating to a poor working relationship with a more senior supervisor, Ms. Ochoa. As a result of Plaintiff's reaction to her poor relationship with Ms. Ochoa, she began to see Dr. Sánchez, who medicated her and gave her two weeks' recess to help mitigate her condition. When Plaintiff returned to work, she recalls, she spoke to her manager and it became clear that it would be better for her not to remain in a supervisory position and she therefore returned to her normal position as a window clerk (but was apparently promoted back to supervisor at a later date).

Overall, the factual record available does support Defendant's assertion that "working under unexpected stress or pressure is inevitably present and is part of a supervisory position [at the Postal Service]." Docket Document No. 24. In refuting this assertion, Plaintiff is faced with the "Catch-22" described in Calero-Cerezo: "when arguing that she is a qualified individual under the Act[, s]he must show both that her impairment substantially

limits a major life activity and that she is 'otherwise qualified' for her job, meaning that she is able to perform the essential functions her position requires, or would be if reasonable accommodated. In shorthand, the law requires the individual to be both substantially limited and reasonably functional." 355 F.3d at 22.

Plaintiff attempts to surmount this difficulty by asserting that though her "major depression substantially impaired most her major life's activities," she was "able to preform her supervisory duties because her mental symptoms were sufficiently under control by psychiatric treatment and pharmacotherapy." Docket Document No. 42. Plaintiff contends that it was Alston's "military supervisory style"- his short temper and tendency to scream- that aggravated her anxiety such that she could not function in the workplace without frequent absences to visit Dr. Sánchez and to collect herself.

Plaintiff admits, however, that by September 25, 2000 (around the time that she claims Defendant failed to provide an adequate accommodation, thus forcing her into retirement), her "coping mechanisms were deteriorated and her tolerance for stress was very low . . . ." Plaintiff quotes her own physician, Dr. Sánchez, as stating that "she should return to work in a low stress, low demanding [sic] environment. If she is placed under stressful situation [sic] a marked deterioration is expected." Although Plaintiff's major flare-up of anxiety in April and May 2000 may

arguably have been aggravated by a personal incompatibility with Alston, the parties agree that by the late summer and early autumn of 2000, her emotional stability was so compromised that Dr. Sánchez recommended that she avoid not only Alston but any stressful situation at all. We do not see how a reasonable juror could find that an employee incapable of handling any stress or high workplace demands is qualified to fill a supervisory role such as the one described herein.

Unlike the circuit court's finding in Calero-Cerezo, we do not find the factual record "adequate to generate an issue for consideration by a factfinder regarding Plaintiff's capacity to perform her job, even while suffering her major depression, at least with an appropriate accommodation." 355 F.3d at 23. Although Plaintiff's inability to establish herself as qualified for her position is fatal to her Rehabilitation Act claim, we will proceed with a full analysis of her claims, turning now to whether Defendant offered a reasonable accommodation.

3. Reasonable Accommodation

An employer must provide a requested reasonable accommodation once aware of an employee's disability, unless it can show that the proposed accommodation would pose an undue hardship for its business. See Higgins v. New balance Athletic Shoe, Inc., 194 F.3d 252, 264 (1st Cir. 1999). To show that a proposed accommodation was reasonable, a plaintiff must prove "not only that the proposed

accommodation would enable her to perform the essential functions of her job, but also that, at least on the face of things, it is feasible for the employer under the circumstances." Reed v. LePage Bakeries, Inc., 244 F.3d 254, 259 (1st Cir. 2001). "An adequately supported denial of an accommodation request requires the employer 'to produce at least some modicum of evidence showing that the requested accommodation would be a hardship, financial or otherwise." Calero-Cerezo, 355 F.3d at 23 (quoting Ward v. Mass. Health Research Inst., Inc., 209 F.3d 29, 37 (1st Cir. 2000)).

In the present case, the uncontested facts clearly indicate that both parties actively engaged in trying to find a workable solution to accommodate Plaintiff's depression and anxiety-related need to work in a stress-free environment away from Alston. On numerous occasions from August to October 2000, Mr. Vázquez met with Plaintiff, in conformity with the requirement that there be "a great deal of communication between the employee and employer." Garcia-Ayala v. Leerle Parentalss, Inc., 212 F.3d 638, 648 (1st Cir. 2000). He was constrained in his search by Plaintiff's shift requirements, location preferences, her need to be free from almost any meaningful physical exertion whatsoever, and the need to find a supervisory position that was stress-free. Plaintiff baldly asserts that there were positions available to meet her exacting specifications, but there is no evidence in the record to support this contention. In contrast, Defendant demonstrates that Mr. Vázquez proffered the four

possibilities he could find that came closest to fitting the bill, and was constrained greatly by Plaintiff's inability to begin the working day before 9:30 AM. Plaintiff even accepted one of the four accommodation offers and began working at Cupey Station on August 5, 2000. She admits that she was unable to arrive at work in a timely fashion to her new post, and so was ordered to return to working at Bayamón Gardens Station.

In compliance with the directive that "it may be necessary for the covered entity to initiate an informal, interactive process with the individual, 29 C.F.R. § 1630.2(o)(3), once Mr. Vázquez failed to find a position to meet Plaintiff's needs, he referred her case to RAC. In November 2000, RAC authorized Mr. Vázquez to put Plaintiff in touch with Ms. Peréz, but the undisputed fact that Plaintiff disappeared from the workplace entirely after August 25, 2000 rendered it impossible for Mr. Vázquez to arrange a meeting. "[B]oth the employee and a responsible representative of the employer have a duty to participate" in the interactive process to find a mutually-satisfactory accommodation. Calero-Cerezo, 355 F.3d at 24. Plaintiff makes no showing that she continued to engage with Mr. Vázquez after her case's reference to the RAC.

During late 2000, Plaintiff did apply for another position with the Postal Service, for which she was rejected. However Defendant was not obligated to offer Plaintiff a particular position simply because Plaintiff found the working hours to be desirable. Rather,

Defendant was fully entitled to decline Plaintiff's application if, for instance, Plaintiff was not deemed qualified for the position. We take it at face-value that requiring an employer to assign an employee to a position for which she is unqualified merely because it fits her bill for a reasonable accommodation would be an "undue hardship" to the employer, and thus exempt from the Rehabilitation Act's demands. See Reed, 244 F.3d at 259.

In short, the record shows that while Plaintiff was disabled within the Rehabilitation Act's cognizance, her intolerance for stress rendered her unqualified to perform the essential functions of her job, and, even were she qualified, the record clearly shows that Mr. Vázquez actively tried to find an accommodation that would satisfy Plaintiff's many demands.

B. Hostile Work Environment

To establish a hostile work environment, Plaintiff must show that her "workplace was permeated with discriminatory intimidation, ridicule, and insult that [was] sufficiently severe or pervasive to alter the conditions of . . . [her] employment and create an abusive working environment." Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993); Quiles-Quiles v. Henderson, 439 F.3d 1, 7 (1st Cir. 2006)(assessing hostile work environment claim under the Rehabilitation Act). Relevant are "the severity of the conduct, its frequency, and whether it unreasonably interfered with the victim's work performance." Quiles-Quiles, 439 F.3d at 7. Plaintiff must

demonstrate that "the workplace was both subjectively and objectively hostile." Mannie v. Potter, 394 F.3d 977, 982 (7th Cir. 2005).

This case features an utter lack of supporting evidence of treatment "that a reasonable person would find hostile or abusive." Id. The key incidents involving Alston– that is, those confrontations that prompted Plaintiff to leave the workplace for psychiatric treatment with Dr. Sánchez– may at the most convey that Alston possessed an abrasive managerial style, but contain no hint of "ridicule" or maliciousness. Id.; see also Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998)(finding that federal employment discrimination laws do not establish a "general civility code" for the workplace); cf. Arrieta-Colon v. Wal-Mart P.R., Inc., 434 F.3d 75, 88 (1st Cir. 2006)(affirming disability harassment verdict where the evidence showed that plaintiff was subject to "constant mockery" due to his disability). Even were we to characterize Alston's conduct has hostile, there is no evidence on record suggesting that it was directed at Plaintiff "because of a characteristic protected by a federal anti-discrimination statute." Quiles-Quiles, 439 F.3d at 7-8.

C. Constructive Discharge

Defendant argues that Plaintiff did not exhaust her administrative remedies as to a constructive discharge claim, and in any case, is unable to make a prima facie showing that a constructive discharge occurred. Because we find that Plaintiff did not exhaust

her administrative remedies, we will not address the issue on its merits.

Like all federal anti-discrimination employment laws, the Rehabilitation Act requires administrative exhaustion, and issues that did not appear within the scope of an administrative process may not be touched upon in a subsequent federal action. Roman-Martinez v. Runyon, 100 F.3d 213, 219-20 (1st Cir. 1996); see also Jensen v. Frank, 9212 F.2d 517, 520 (1st Cir. 1990)("Title VII requires exhaustion of administrative remedies as a condition precedent to suit in federal district court."). Since Plaintiff does not dispute that the constructive discharge claim did not appear in her administrative complaint, it is dismissed.

D. Retaliation

The Rehabilitation Act "prohibits retaliation against employees for complaining about violations of the Act." Quiles-Quiles v. Henderson, 439 F.3d 1, 8 (1st Cir. 2006); see also 29 U.S.C. § 791. A plaintiff must establish that: (1) she engaged in protected conduct; (2) she experienced an adverse employment action; and (3) there was a causal connection between the protected conduct and the adverse employment action. Quiles-Quiles, 439 F.3d at 8. The creation of a hostile work environment– or the intensification of a pre-existing hostile environment– can satisfy the adverse employment action requirement. Id.; Noviello v. Boston, 398 F.3d 76, 89 (1st Cir. 2005).

In considering a retaliation claim, the relevant conduct is that which occurred after Plaintiff complained. Quiles-Quiles, 439 F.3d at 8. Plaintiff provides the most meager of allegations as to conduct that intensified after she initiated a disability complaint. In speaking to Plaintiff in a low and threatening voice and requesting that Plaintiff clock her hours, Alston conveyed nothing more than a predictable level of frustration at Plaintiff's almost constant absences from work and inability to handle work-related stress. While possibly insensitive, Alston's actions cannot be considered as retaliatory under any light, especially as Plaintiff concedes that he was abrasive before she engaged in protected activity and, in fact, was abrasive with nearly all of his subordinates. There is no evidence available to suggest that Alston or Vázquez assigned Plaintiff to the Bayamón Pueblo detail with the knowledge that the work would require her to exceed her physical limitations. Indeed, Plaintiff concedes that Vázquez responded instantaneously, upon learning of the problem, by removing her from the detail. Similarly, we are unmoved by Plaintiff's complaint that Alston changed her schedule upon her return to the Bayamón Garden Station; inconvenient scheduling alone does not represent an adverse employment action, especially absent any showing of a causal connection between the protected activity and the scheduling problem. See, e.g., Long v. First Union Corp. of Va., 894 F. Supp. 933, 944 (E.D.Va. 1995)(holding that employee failed to establish retaliatory

constructive discharge when supervisor refused to alter her work schedule to accommodate her educational needs and had adjusted other workers' schedules).

We find no evidence upon which a trier of fact could conclude that Plaintiff was penalized for engaging in protected conduct.

IV.

Conclusion

In accordance with the foregoing, we **GRANT** Defendant's motion for summary judgment. Docket Document No. 24. Plaintiff's claims are **DISMISSED WITH PREJUDICE.** Judgment shall be entered accordingly.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 12th day of June, 2006.

S/José Antonio Fusté
JOSE ANTONIO FUSTE
Chief U.S. District Judge